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Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime
Eleventh session
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Item 4 of the provisional agenda*
Finalization and approval of the additional international legal instrument against illegal trafficking in and transporting of migrants

Proposals and contributions received from Governments

Colombia, Mexico and Morocco: amendments to the preamble and article 11 of the revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime

Preamble

1. With regard to the proposal already submitted by Colombia (see A/AC.254/5/Add.27), the following modification is suggested to replace the proposed amendment to preambular paragraph (i):

> "(i) *Also convinced* that, to deal with the phenomenon of migration, global and regional approaches, including socio-economic measures, are necessary to improve the situation of vulnerable population groups in the countries of origin".

2. The text of the new preambular paragraph to be added after paragraph (k) would remain as proposed (see A/AC.254/5/Add.27):

> "(...) *Taking note* of the conventions and other relevant instruments of the United Nations on the protection of migrants".

3. Two further proposals are made with regard to the preamble:

(a) It is proposed that the following new preambular paragraph be inserted after preambular paragraph (a):

> "(...) *Recognizing* that migration is a social phenomenon that has contributed to the development of nations and can, bearing in mind the interests of the countries

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of origin and of the receiving countries and also the human rights of migrants, promote the advancement of societies";

(b) It is proposed that preambular paragraph (o) be amended as follows:

"*Reaffirming* respect for the sovereignty and territorial integrity of all States and the desirability of international cooperation".

Article 11: Prevention

4. It is proposed that a new paragraph be added after paragraph 2:

"(...) With the aim of discouraging and preventing the smuggling of migrants, States Parties shall endeavour, where appropriate, to adopt legislation and to conclude bilateral or multilateral agreements that take into account the socio-economic realities of migration."

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Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime
Eleventh session
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Agenda item 4
Finalization and approval of the additional international legal instrument against illegal trafficking in and transporting of migrants

Proposals and contributions received from Governments

Azerbaijan: amendments to articles 1-6, 7 bis, 7 ter, 7 quinquiens-12, 14, 15 and 16 of the revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime

Article 1: Relation to the United Nations Convention against Transnational Organized Crime

1. As a further refinement to the previous proposal made by Azerbaijan (see A/AC.254/5/Add.27), it is proposed that the two options for this article be merged and redrafted as proposed by the Secretariat (see A/AC.254/5/Add.28) and that the article be transferred to chapter IV, "Final provisions", of the draft Protocol.

Article 2: Definitions

2. It is proposed that subparagraph (a) of this article be redrafted to read:

> "(a) 'Smuggling of migrants' shall mean the procurement of the illegal entry of a person into any State Party of which the person is not a national or in which the person has no right of permanent residence, for the purpose of residence or transit, or the procurement of the illegal residence of such a person in the receiving State Party or that person's illegal transit through the territory of that State Party in order to obtain, directly or indirectly, a financial or other material benefit;"

3. In subparagraph (c), it is proposed that the words "in the State concerned" be replaced with the words "in that State".

Article 3: Purposes

4. In order to bring the substance of this article into line with the provisions of the United Nations Convention against Transnational Organized Crime ("the Convention") and with the provisions of the revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention ("the Trafficking in Persons Protocol"), it is proposed that subparagraph (c) be deleted from the text of this article and that subparagraphs (a) and (b) be redrafted to read as follows:

"(a) To prevent, investigate and prosecute the smuggling of migrants, with due regard for the protection of the rights of the smuggled migrants; and

"(b) To promote cooperation among States Parties to meet those objectives."

5. It is proposed that this article be moved to the beginning of the draft Protocol.

Article 3 bis: Criminal liability of migrants

6. It is proposed that this article be deleted since its ambiguous character could give rise to difficulties in settling questions of whether smuggled migrants should be prosecuted under criminal law for illegally crossing a state border or using fraudulent documents.

7. If a majority of delegations insist on retaining this article, Azerbaijan could accept this decision provided that the following wording is added at the end of the article: ", except in cases where their actions contain elements of an offence."

Article 4: Criminalization

Paragraphs 1 and 2

8. It is proposed that these paragraphs be redrafted to read as follows:

"1. States Parties shall adopt the necessary legislation or other measures to establish as criminal offences in accordance with their domestic law, when committed intentionally:

"(a) The smuggling of migrants, as defined in article 2, subparagraph (a), of this Protocol;

"(b) The forgery or unlawful alteration of a travel or identity document or of a document authorizing entry into a State, or the procuring, sale or use of such a document to create the conditions necessary for the smuggling of migrants.

"2. States Parties shall also adopt the necessary legislation or other measures to establish as a criminal offence the following conduct:

"(a) Attempting to commit an offence set forth in paragraph 1 of this article;

"(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence set forth in paragraph 1 of this article;

"(c) Agreement or participation, as defined in article 3, subparagraph 1 (a), of the Convention, to or in the commission of an offence set forth in paragraph 1 of this article."

9. The amendments proposed above would help to bring the content of this article into line with the provisions of the Convention and of the Trafficking in Persons Protocol and

also reflect in part the proposal made by India concerning paragraph 2 (see A/AC.254/5/Add.27).

Article 5: Scope of application

10. It is proposed that this article be amended to read:

> "This Protocol, except as otherwise provided, applies to the prevention, investigation and criminal prosecution of the offences set forth in article 4 of this Protocol, when such conduct is transnational in character and involves an organized criminal group, as defined in articles 2 and 3 of the Convention."

Article 6: Jurisdiction

Paragraph 2

11. It is proposed that this article be deleted from the text since its substance could be covered by the article entitled "Relation to the Convention", under which the provisions of the Convention would apply mutatis mutandis to this Protocol.

Article 7 bis: Measures against the smuggling of migrants by sea

Paragraph 1

12. Because of problems in the Russian translation of this provision and the concern of some delegations about the possibility of errors being made in suppressing the use of a vessel for trafficking in persons (see A/AC.254/4/Add.1/Rev.6, footnote 50), it is proposed that this paragraph be redrafted to read:

> "1. A State Party that has reasonable grounds to suspect that a vessel, which is flying its flag or claiming its registry, is not in reality of the nationality of that State or, though flying a foreign flag, refuses to show it and is in reality of the nationality of another State Party and is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. States Parties so requested may, provided that compelling arguments are presented by the requesting State Party, render such assistance within the means available to them."

Paragraph 2

13. In subparagraph (c) it is proposed that the word "expressly" in square brackets be deleted and that the words "in accordance with article 7 *ter* of this Protocol" be replaced with the words "and in conformity with the obligations set forth in article 7 *ter* of this Protocol".

Article 7 ter: Safeguard clauses

Paragraph 2

14. It is proposed that this paragraph be redrafted to read:

> "2. Where measures taken pursuant to article 7 *bis* of this Protocol have proved to be unfounded, the vessel shall be entitled to compensation for any loss or damage sustained by it, provided that it has not committed any act justifying the taking of those measures."

Paragraph 3

15. For the sake of greater consistency between this paragraph and article 17, paragraph 11, of the 1988 Convention, it is proposed that this paragraph be redrafted to read:

> "3. Any measure taken pursuant to article 7 *bis* of this Protocol shall take due account of the need not to interfere with or to affect:
>
> "(a) The exercise of the rights, obligations and jurisdiction of coastal States in accordance with the international law of the sea; and
>
> "(b) ... ."

Paragraph 5

16. It is proposed that the words "or as otherwise authorized by" be deleted from this paragraph and that the word "taken" in its second occurrence be replaced with the word "undertaken".

Article 7 quinquiens: Measures for the protection of immigrants

17. It is proposed that this article be deleted since its substance is more concisely expressed in article 15 *bis* of the draft Protocol.

18. Should a majority of delegations support the retention of this article, Azerbaijan would like to propose the following amendments:

(a) Paragraph 2 should be drafted precisely as proposed by Mexico and Morocco (see A/AC.254/L.209) (Russian version);

(b) At the end of paragraph 4, the following words should be added: "or in which they had the right of permanent residence at the time of entry into the receiving State".

Article 8: Compliance measures and arrangements

Paragraph 2

19. It is proposed that the words "or understandings" be deleted from the text of this paragraph.

20. In subparagraph (a), it is proposed that the word "limit" be replaced with the word "suppress" and that the word "combat" be deleted.

New paragraph

21. Azerbaijan supports the proposal made by Mexico (see A/AC.254/5/Add.27) that a new paragraph be added to the article, but proposes that the text of the proposed new paragraph be amended to read:

> "(...) If the States Parties have already concluded such agreements or arrangements among themselves or have otherwise established relations among themselves regarding matters covered by this Protocol, they shall have the right to implement such agreements or arrangements or to regulate such relations accordingly instead of this Protocol."

Article 9: Other legislative and administrative measures against smuggling of migrants by land, air or sea

Paragraph 2

22. [*The first two proposed amendments refer to the Russian text only.*] It is proposed that the words "to the extent possible," be inserted after the word "ascertain". It is also proposed that the words "travel" and "State" be replaced with "valid passports and visas or any other" and "State Party", respectively.

23. In this and other provisions of the draft Protocol reference is made to "travel documents" and "travel or identity documents". However, no indication is given in any of these provisions as to what documents should be considered travel documents, which gives rise to difficulties in the comprehension of particular provisions of the draft Protocol. Azerbaijan considers that the term "travel documents" should be taken to mean documents giving entitlement to travel on a particular form of transport. This definition of the term should not cover documents confirming identity or providing authorization to enter a State. It is therefore proposed that a corresponding definition of the term "travel documents" be given in article 2 of the draft Protocol.

Paragraph 3

24. It is proposed that the word "intentional" be added before the word "violation".

Article 10: Information

Paragraph 3

25. It is proposed that subparagraphs (c) and (d) be amended to read:

> "(c) The authenticity and proper form of travel or identity documents or authorizations issued by a State Party and advice concerning prevention of the theft or other misuse of blank documents of this nature;
>
> "(d) Means and methods of concealment of the illicit transportation of persons or the unlawful alteration, reproduction or acquisition of documents used in the smuggling of migrants or other unlawful acts in relation to such documents and ways of detecting them;"

Article 11: Prevention

Paragraph 1

26. In order to bring the content of this paragraph into line with the provisions of the Trafficking in Persons Protocol, it is proposed that paragraph 1 be amended to read as follows:

> "1. Without prejudice to international obligations in respect of the free movement of persons, States Parties shall, to the extent possible, adopt the necessary measures to detect and prevent the smuggling of migrants by strengthening border controls, including by checking persons and travel or identity documents or requisite authorizations and, where appropriate, through disembarkation from and inspection of means of transport and vessels, with due regard to human rights."

New paragraph

27. Azerbaijan supports the proposals by China, Colombia, the Holy See, and the Syrian Arab Republic and considers that new paragraphs should be added at the end of the article, its preference being for the text proposed by the Holy See (see A/AC.254/5/Add.27).

Article 12: Security and control of documents

28. The words "easily misused" and "readily ... unlawfully" used in this paragraph have the same meaning. In order to eliminate this tautology, one of these formulations should be deleted.

Article 14: Training

Paragraph 2

29. It is proposed that the words "to protect the rights of victims of such [smuggling] [trafficking] and illegal transport" be replaced with the words "to protect the rights of persons subjected to such smuggling or illegal transport".

30. Azerbaijan supports the proposal made by the Libyan Arab Jamahiriya (see A/AC.254/5/Add.27) for the deletion of subparagraph (a) since the provision in question is not a matter of training but is one of the measures indicated in article 12 of the draft Protocol.

31. It is proposed that subparagraph (b) be amended to read:

> "(b) Methods of recognizing and detecting fraudulent or altered travel or identity documents;"

32. It is proposed that subparagraph (c) be amended to read:

> "(c) Methods of identifying criminal groups and associations engaged in the smuggling of migrants; methods used in the transport of smuggled migrants and the misuse of travel or identity documents; and means of concealing activities related to the smuggling of migrants;"

33. In subparagraph (d) it is proposed that the words "Improving procedures for" be replaced with the words "Methods of".

34. In subparagraph (e) it is proposed that the words "Recognizing the need to provide" be replaced with the words "Examining legislative and other provisions aimed at providing".

Paragraph 3

35. Azerbaijan essentially supports the proposal made by Cameroon (see A/AC.254/5/Add.27) and agrees that paragraph 3 should form a separate article, but would propose amending the proposal to include the words "and means" after the word "expertise" in both instances of its occurrence.

Article 15: Return of smuggled migrants

36. In order to bring the text of this article into line with the provisions of the Trafficking in Persons Protocol and to respond to the concern expressed by Cameroon and the Libyan Arab Jamahiriya (see A/AC.254/5/Add.27), it is proposed that this article be amended to read as follows:

"1. A State Party of which the smuggled migrant is a national or in whose territory such person had the right of permanent residence at the time of entry into the receiving State shall facilitate the return of that person and enable his or her readmission without undue or unreasonable delay with due regard for the need to ensure the safety of the person in question.

"2. When a State Party returns a smuggled migrant to a State Party of which that person is a national or in which the person had the right of permanent residence at the time of entry into the receiving State, such return shall be effected with due regard for the need to ensure the safety of the person in question and for any proceeding related to the smuggling of that person.

"3. At the request of the State Party that is the receiving party, each State Party shall, without undue or unreasonable delay, verify whether the smuggled migrant is a national of the requested State Party or whether such person had the right of permanent residence in that State at the time of entry into the receiving State.

"4. In order to facilitate the return of a smuggled migrant not in possession of the proper documentation, the State Party of which the person is a national or in which the person had the right of permanent residence at the time of entry into the receiving State shall agree to issue, at the request of the receiving State Party, the identity documents or authorization necessary for the return of the migrant to the territory of the State of origin."

Article 16: Implementation

37. It is proposed that this article be deleted from the draft Protocol since the provision it contains is covered by the Convention, whose provisions apply mutatis mutandis to this Protocol, a point that could be highlighted in the article entitled "Relation to the United Nations Convention against Transnational Organized Crime".